

**United States Department of Labor
Employees' Compensation Appeals Board**

T.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bethesda, MD, Employer**

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**Docket No. 15-1502
Issued: April 12, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 6, 2015 appellant filed a timely appeal of a June 19, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has established more than eight percent permanent impairment of his right leg.

FACTUAL HISTORY

This case has previously been before the Board. On August 17, 1995 appellant injured his right knee. He filed a claim for benefits on August 18, 1995 which OWCP accepted for right knee sprain.

¹ 5 U.S.C. § 8101 *et seq.*

A magnetic resonance imaging (MRI) scan taken of appellant's right knee on November 14, 1995 was interpreted by Dr. Timothy J. Greenan, a Board-certified diagnostic radiologist, as revealing mild tricompartmental osteoarthritis, and degenerative change of the posterior horns of the medial and lateral menisci.

On February 15, 1997 Dr. Irvin A. Guterman, Board-certified in orthopedic surgery, performed a partial lateral meniscectomy, right knee arthroscopy and partial resection of a hypertrophic synovium. Appellant underwent a procedure to repair a right knee posterior of the lateral meniscus and hypertrophic synovium.

By decision dated December 3, 2002, OWCP granted a schedule award for two percent permanent impairment of the right lower extremity. In a decision dated September 29, 2003,² the Board set aside the December 3, 2002 OWCP decision and remanded the case for further development. The Board found that OWCP had not explained why it selected a diagnosis-based leg impairment rating of two percent was utilized rather than an eight percent anatomic rating for thigh atrophy. By decision dated March 10, 2004, OWCP issued a schedule award for an additional six percent permanent impairment to the right leg.

On August 28, 2006 appellant filed a Form CA-7 claim for an additional schedule award. By decision dated May 14, 2008, OWCP denied the claim for an additional schedule award. Appellant appealed to the Board and in a decision dated December 5, 2008,³ the Board affirmed the May 14, 2008 OWCP decision.

On October 11, 2010 appellant again requested an additional schedule award for permanent impairment of his right leg.

In an October 11, 2010 report, Dr. Guterman advised that appellant had continued complaints of the right knee, including periodic episodes of exacerbation depending on his activities. On examination he measured a range of motion of 0 to 115 degrees in the right knee, with thigh circumference of 58 centimeters on the right and 60 centimeters on the left, 10 centimeters above the patella. Dr. Guterman concluded that appellant had residual symptoms, quadriceps weakness, and mild degenerative joint disease, right knee, status post lateral meniscectomy.

In a November 3, 2010 report, Dr. Guterman rated an 11 percent permanent impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) (A.M.A., *Guides*). He found that under Table 16-3, page 509 of the A.M.A., *Guides* appellant's condition warranted three percent impairment for his partial lateral meniscectomy. Dr. Guterman rated a functional history grade modifier of 2 at Table 16-6, page 516; a grade modifier of 1 for physical examination at Table 16-7, page 517; a grade modifier of 1 for range of motion and 2 for muscle atrophy. This amounted to an additional 8 percent impairment of the lower extremity, for a total of 11 percent permanent impairment of the right lower extremity.

² Docket No. 03-1006 (issued September 29, 2003).

³ Docket No. 08-1651 (issued December 5, 2008).

In a report dated February 27, 2012, Dr. Christopher R. Brigham, Board-certified in occupational medicine and an OWCP medical adviser, reviewed Dr. Guterman's reports and found that appellant did not have any additional impairment of the right leg pursuant to the sixth edition of the A.M.A., *Guides*. He rated a class 1, two percent default impairment for appellant's partial meniscectomy at Table 16-3, with a default score of two percent lower extremity impairment, finding that Dr. Guterman's three percent right lower extremity impairment was not consistent with the default value of the class 1 rating. Dr. Brigham further found that Dr. Guterman's additional eight percent lower extremity impairment was not rendered in accordance with the method value in the A.M.A., *Guides* for applying the grade modifiers to the default value of the impairment rating. He opined that Dr. Guterman's grade modifier of 1 for functional history was not appropriate because the medical reports of record did not document any antalgic gait or corrective footwear; he therefore assigned a grade modifier of 0 for functional history. With regard to the grade modifier for physical examination, Dr. Brigham reported that the grade modifier of 2 for atrophy of two centimeters difference in the circumference of the right thigh was not applicable because the medical reports of record showed no difference in calf circumference. In addition, he found that the reported range of motion measurements did not support range of motion deficit of the right knee. Dr. Brigham therefore assigned a grade modifier of 1 for minimal palpatory findings. This rendered a net adjustment of minus 1, grade B, for two percent permanent impairment for the right knee.⁴

By decision dated March 5, 2012, OWCP found that appellant had more than the eight percent permanent impairment previously awarded.

Appellant appealed to the Board. In a decision dated November 20, 2012,⁵ the Board affirmed the March 5, 2012 OWCP decision. The complete facts of this case as set forth in the Board's September 29, 2003, December 5, 2008, and November 20, 2012 decisions are incorporated herein by reference.

On August 9, 2013 appellant again requested an additional schedule award for permanent impairment of his right leg.

In a report dated October 21, 2013, Dr. Guterman, relying on the same findings and conclusions he presented in his November 3, 2010 report, reiterated his opinion that appellant had 11 percent left lower extremity impairment under the A.M.A., *Guides* pursuant to Table 16-3 at page 509, based on 3 percent impairment for partial lateral meniscectomy, a grade modifier of 2 for functional history; a range of motion grade modifier of 1 for range of motion; a grade modifier of 2 for muscle atrophy for physical examination. This rendered an additional eight percent permanent impairment of the lower extremities is determined.

In an additional October 21, 2013 report, Dr. Guterman noted that appellant had undergone x-rays of his right knee which reflected no significant changes with mild degenerative joint disease.

In an October 4, 2014 report, Dr. Lawrence A. Manning, an OWCP medical adviser, reviewed Dr. Guterman's October 21, 2013 report and found that appellant was not entitled to an

⁴ A.M.A., *Guides* 510.

⁵ Docket No. 12-1191 (issued November 20, 2012).

additional schedule award. He noted that Dr. Guterman rated impairment based on muscle atrophy and reported that he was not sure how he calculated an additional impairment based on muscle atrophy. Dr. Manning expressed his disagreement with this finding, asserting that this would be part of the physical examination finding and used as a grade modifier in adjusting the diagnosis-based impairment in this case for lateral meniscus tear. He noted that there was no reference in the A.M.A., *Guides* for a diagnosis-based impairment based on muscle atrophy at page 509, Table 16-3. Dr. Manning found that the impairment for partial lateral meniscectomy ranges from one percent to three percent; based on the grade modifier submitted by Dr. Guterman, that is a grade 1 modifier for physical examination and grade 2 modifier for functional history, which warrants a class 1, grade E impairment of three percent. He advised that although Dr. Guterman reported mild arthritis of the right knee, he did not specify the joint space measurements required to rate an impairment under the A.M.A., *Guides*. Dr. Manning therefore concluded that, given the information in the record, the total permanent impairment for right lower extremity was three percent. He advised that in the event that joint space measurements were provided, he would review these to see if any further degree of impairment was warranted. Dr. Manning determined that the date of maximum medical improvement was October 21, 2013, the date of Dr. Guterman's report.

By decision dated November 10, 2014, OWCP found that appellant had no additional impairment of the right leg greater than the eight percent previously awarded.

In a report dated July 14, 2014, received by OWCP on December 23, 2014, Dr. Guterman advised that appellant continued to experience persistent right knee pain, particularly along the back and outer aspect of the knee. He reported no swelling in the knee but advised that there was some tightness and pain with increased walking, in addition to slight effusion. Dr. Guterman asserted that appellant's knee was stable to varus and valgus stress testing and had adequate strength; he reiterated that appellant underwent x-ray tests which showed no significant changes in his mild degenerative joint disease. He advised that he had residual right knee symptoms consistent with strain, osteoarthritis, and status post meniscectomy. Dr. Guterman recommended treatment with ice, stretching, and strengthening exercises, and restricting the amount of time appellant spent on his feet.

In a December 2, 2014 report, Dr. Guterman advised that appellant's right knee symptoms were generally unchanged. He had complaints of right knee pain and swelling which increased with activity. Dr. Guterman reported that on examination his right knee showed slight effusion with no point tenderness and mild medial tenderness with McMurray's testing. He noted that x-rays taken on October 21, 2013 showed persistent degenerative changes with three millimeter joint space.

In an additional December 2, 2014 report, Dr. Guterman found that appellant had 10 percent right lower extremity impairment. He based this rating on the three percent impairment for partial lateral meniscectomy, set forth previously, combined with seven percent impairment for a three millimeter cartilage interval in the right knee pursuant to Table 16-3 with "appropriate grade modification."⁶ This report was not reviewed by an OWCP medical adviser.

On December 8, 2014 appellant requested a review of the written record.

⁶ Dr. Guterman did not specify the grade modifiers upon which he relied in calculating this rating.

By decision dated June 19, 2015, an OWCP hearing representative affirmed the November 10, 2014 decision. She noted that Dr. Guterman had provided an additional right lower extremity impairment rating in his December 2, 2014 report based on his review of the October 21, 2013 x-ray report which demonstrated a three millimeter joint space due to degenerative changes in the right knee; she asserted, however, that Dr. Guterman did not provide the actual x-ray report with the cartilage measurement or explain how the diagnosed right knee mild degenerative joint disease was caused or contributed to by the accepted August 17, 1995 work incident. The hearing representative found that because right knee degenerative change was not an accepted condition, Dr. Guterman's amended rating of December 2, 2014 did not warrant further review.

LEGAL PRECEDENT

The schedule award provision of FECA⁷ and its implementing regulations⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁹ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.¹⁰

OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which describes the impairment in sufficient detail for the claims examiner to visualize the character and degree of disability.¹¹ The claims examiner should review the case file to determine if medical evidence meeting the above criteria has been submitted. This includes a detailed report that includes a history of clinical presentation, physical findings, functional history, clinical studies, or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated.¹²

OWCP procedures further provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical consultant for an opinion concerning the nature

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

⁹ *Id.*

¹⁰ *Veronica Williams*, 56 ECAB 367, 370 (2005).

¹¹ See *Federal (FECA) Procedure Manual*, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(b) (February 2013).

¹² See *id.* at Chapter 2.808.6(a) (February 2013).

and percentage of impairment in accordance with the A.M.A., *Guides* with an OWCP medical consultant providing rationale for the percentage of impairment specified.¹³

ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant was previously granted schedule awards for eight percent permanent impairment of the right lower extremity. He requested an additional award and submitted Dr. Guterman's December 2, 2014 report, which found 10 percent permanent impairment for the right lower extremity. This was based on his rating for three percent impairment for partial lateral meniscectomy, set forth previously, combined with seven percent impairment for a three millimeter cartilage interval in the right knee pursuant to Table 16-3 with "appropriate grade modification."

This report was not reviewed by an OWCP medical adviser. In a June 19, 2015 decision, an OWCP hearing representative found that Dr. Guterman's additional right lower extremity impairment rating, based on his review of an October 21, 2013 x-ray report showing a three millimeter joint space due to degenerative changes in the right knee, did not warrant an additional schedule award. She noted that Dr. Guterman did not provide the actual x-ray report with the cartilage measurement or explain how the diagnosed right knee mild degenerative joint disease was caused or contributed to by the accepted August 17, 1995 work incident. The hearing representative concluded that because right knee degenerative change was not an accepted condition, Dr. Guterman's modified rating did not warrant further review. It is not clear, however to what extent she considered the medical evidence of record in reaching her opinion.

In determining the degree of permanent impairment, preexisting impairments of the body member are to be included in the evaluation of permanent impairment. The Board has held that the employer takes the employee as he finds him.¹⁴ In the November 14, 1995 MRI scan report of appellant's knee, which was taken shortly after the August 17, 1995 injury, Dr. Greenan noted that appellant had mild tricompartmental osteoarthritis, as well as degenerative change of the medial and lateral menisci. This is clearly suggestive of a preexisting condition.

The Board notes that, in an October 4, 2014 report, an OWCP medical adviser advised that although Dr. Guterman reported mild arthritis of the right knee, he did not specify the joint space measurements required to rate an impairment under the A.M.A., *Guides*. He asserted that in the event that joint space measurements were provided, these would be reviewed to determine whether any further degree of impairment was warranted. However, while Dr. Guterman subsequently did provide these joint space measurements in his December 2, 2014 report, OWCP did not refer them to its medical adviser to determine whether they were sufficient to warrant an additional schedule award.

Proceedings under FECA are not adversary in nature nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares

¹³ See *id.* at Chapter 2.808.6(f) (February 2013).

¹⁴ See *D.F.*, 59 ECAB 288 (2007).

responsibility in the development of the evidence. It has the obligation to see that justice is done. Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁵

The Board finds that given OWCP's failure to refer the case to an OWCP medical adviser for review of Dr. Guterman's updated reports in accordance with the instructions provided in the medical adviser's October 4, 2014 report, the case should be remanded. Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's schedule award claim.

CONCLUSION

The Board finds that this case is not in posture for decision regarding appellant's request for an additional schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development in accordance with this decision of the Board.

Issued: April 12, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ *John W. Butler*, 39 ECAB 852 (1988).